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No. 10-471

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

TONYA MILLER-GOODWIN,

Petitioner,

v.

CITY OF PANAMA CITY BEACH, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Eleventh Circuit's application of its "nearly identical" standard for considering the similitude of comparators in this discrimination case comports with the Supreme Court's comparator jurisprudence.

PARTIES

The petitioner is Tonya Miller-Goodwin. She is referred to throughout as "Goodwin."

The respondent is the City of Panama City Beach, Florida, hereinafter "the City."

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OPINIONS BELOW

Pursuant to Rule 24.2, the City accepts Goodwin's statement of opinions below.

STATEMENT OF JURISDICTION

Pursuant to Rule 24.2, the City accepts Goodwin's statement of jurisdiction.

STATUTES INVOLVED

Pursuant to Rule 24.2, the City accepts Goodwin's statement of the statutes involved.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner, Tonya Miller-Goodwin ("Goodwin"), is a former police officer of the City of Panama City Beach, Florida ("the City") Police Department. [R.28,¶¶2-5; App.20a-21a].[1] She commenced this action in June 2008, by filing a complaint alleging the City unlawfully discriminated and retaliated against her on the

[1] Record citations ("R.__") are to the document numbers utilized by the District Court's Case Management/Electronic Case Filing System. Citations to the Petition are so designated and citations to the appendix appear as "App.___."

basis of her gender[2] in violation of 42 U.S.C. § 2000e, *et seq.*[3] [R.1]. The District Court entered summary judgment in favor of the City and against Goodwin on both claims on April 20, 2009. [App.19a-40a].

Goodwin does not contest the judgment on her retaliation claim; nor does Goodwin contest the District Court's finding that only two of her allegations (the denial of a desired "promotion" and her ultimate termination) constituted adverse employment actions as required under Title VII. [App.28a].

With respect to the adverse employment actions, the District Court found, or assumed, that Goodwin satisfied her initial evidentiary burden of establishing a *prima facie* case of discrimination by showing that similarly situated males received more favorable

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[2] Goodwin also alleged unlawful discrimination and retaliation on the basis of age in violation of 29 U.S.C. § 629, *et seq.* and brought both gender and age claims under the Florida Civil Rights Act ("FCRA"), Chapter 760, *Florida Statutes*. Goodwin voluntarily dismissed these claims with prejudice on July 28, 2008. [R.3]. Goodwin also abandoned her hostile environment sexual harassment claims in response to the City's Motion for Summary Judgment. [R.41, p.2].

[3] The District Court had subject matter jurisdiction over Petitioner's Title VII claim pursuant to 42 U.S.C. § 2000e-5(f)(3), as well as federal question jurisdiction pursuant to 28 U.S.C. § 1331. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). The Circuit Court had jurisdiction pursuant to 28 U.S.C. § 1291 in the appeal from a final summary judgment rendered by the District Court.

treatment. [App.30a,34a]. The District Court also found, however, that the City's legitimate, non-discriminatory business reasons were "sound" and that Goodwin had failed to adduce any evidence to establish pretext for unlawful discrimination. [App.30a,34a,35a]. The District Court's decision did not rely solely on Goodwin's inability to establish a "nearly identical" male comparator.

On *de novo* review, the Eleventh Circuit Court of Appeals affirmed the District Court's grant of summary judgment [App.18a], again finding only two adverse employment actions. [App.10a]. In its rejection of Goodwin's discriminatory promotion claim, the Eleventh Circuit found (1) Goodwin failed to establish a *prima facie* case because she "failed to show that she and the male officer who was promoted . . . were similarly situated," [App.10a]; (2) the City articulated legitimate, non-discriminatory reasons for its actions thereby satisfying the second phase of the *McDonnell Douglas* burden-shifting framework [App.11a]; and (3) Goodwin failed to present any evidence of pretext. [App.11a].

In its rejection of Goodwin's discriminatory discipline claim, the Eleventh Circuit stopped its analysis at the *prima facie* case stage of the *McDonnell Douglas* framework [App.11a,12a], finding Goodwin "did not show that other male employees of the Department engaged in misconduct that was *nearly identical* to hers, but were treated more favorably." [App.13a, emphasis added]. Goodwin now challenges both the Eleventh Circuit's use of the

"nearly identical" standard as well as its placement of the standard at the *prima facie* stage. Determination of these issues, however, will have no effect on Goodwin's case. As the District Court determined, she could not survive summary judgment under any circumstances. [App.33a].

B. Statement of Facts

Goodwin's statement of the case (i.e. facts) in her Petition includes twenty-four (24) citations to the record below – many of which are supported only by her own affidavit filed in response to the City's Motion for Summary Judgment. Goodwin's affidavit is full of conclusory assertions for which Goodwin had no foundation, no personal knowledge, and no evidence. Virtually all of the "comparator" evidence relied on by Goodwin stems from this affidavit. The City timely moved to strike much of the affidavit but the District Court granted summary judgment without addressing the Motion to Strike. The City continues to take great exception to any statement of "fact" which is derived from Goodwin's self-serving affidavit or other documents which it moved to strike.

Goodwin was a female law enforcement officer for the City's Police Department ("the Department") from January 2002 until her resignation in February 2007.

[R.28,¶¶2-5; App.20a-21a].[4] Goodwin's resignation followed an Internal Affairs ("I.A.") investigation which concluded that she violated seven separate Department policies and procedures including lying during the I.A. investigation. [App.21a,33a]. Goodwin fully admitted to five of these violations in her resignation. [App.21a,35a].

The investigation in question centered on a new male recruit's complaint that Goodwin directed an inappropriate remark at him. [R.28,¶19-25]. When a routine shift level investigation of the matter indicated that someone was lying – a much more serious offense – the Chief initiated a formal I.A. investigation to determine the truth. The investigation was expanded to include a male officer and a female officer whom the Department also suspected of lying.

A total of thirty-seven (37) employees were interviewed during the investigation and Goodwin encouraged the Department to interview more. [R.30-14,¶21]. The I.A. investigation concluded that Goodwin and two other officers were guilty of policy violations – including lying during the investigation – and

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[4] Goodwin was initially terminated from the Department. Although she appealed her termination to the City's Civil Service Board, she cut this process short by negotiating her retroactive resignation. [R.30-7,¶30; R.38-65 and 38-66].

all three (one male and two females) were terminated. [App.21a; R.30-7,¶32].[5]

There have been multiple I.A. investigations at the Department through the years – many involving multiple witnesses – and there was nothing unusual about this particular investigation. [R.30-14,¶¶22, 28]. The Department had previously internally investigated five male officers who were found to have lied. All of these male officers were terminated or resigned in lieu of termination. [R.30-7,¶40].

With respect to Goodwin, the investigation determined that she had violated seven separate Department policies, including:

i. Article I – Conduct Unbecoming an Officer – Section 04: Knowingly and willfully making a false report or entry into Department records.

ii. Article I – Conduct Unbecoming an Officer – Section 15: Repeated violations of Department rules and regulations; or any other course of conduct indicating that a member has little or no regard for his (her) responsibility as a member of the Police Department.

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[5] Another male officer was also found to be untruthful during the investigation; however, he ultimately admitted his error, cooperated, and told the truth. He thus received only a five day suspension. [R.30-7,¶32].

iii. Article I – Conduct Unbecoming an Officer – Section 18: Engaging in any conduct which constitutes conduct unbecoming an officer not listed above, or any act, which is likely to adversely affect the discipline, good order, or reputation of the department.

iv. Article IV – Neglect of Duty – Section 05: Failure to properly supervise subordinates; or to refer disciplinary charges, or to take other appropriate disciplinary action.

v. Article IV – Neglect of Duty – Section 06: Failure to comply with orders, directives, regulations, etc., oral or written.

vi. Article IV – Neglect of Duty – Section 12: Failure to properly patrol zone, unauthorized absence from assignment, failure to respond to radio call; idle conversation or loafing.

vii. Article IV – Neglect of Duty – Section 13: Improper use of radio and established communications procedures.

[R.30-7,¶28].

Goodwin also complained that she did not receive an appointment to a desirable duty assignment. [R.41,pp.6-7]. The duty assignment (characterized by Goodwin as a "promotion") was not a promotion in rank and had no associated increase in pay or benefits. [App.29a; R.28,¶60]. The position was given to

Sergeant Deegins in October 2006 because he outranked Corporal Goodwin. [App.10a,30a].

REASONS FOR DENYING THE WRIT

The answer to the question presented by Goodwin is a resounding "no." A *prima facie* case of intentional discrimination does not require a judicial finding that the defendant gave more favorable treatment to a "nearly identical" comparator, and the Eleventh Circuit's opinion in Goodwin does not so hold.

The answer to the question presented by the City is an equally emphatic "yes." The Eleventh Circuit's analysis of Goodwin's comparator evidence is wholly consistent with the requirements of this Court and with the analytical framework of other circuits.

Goodwin's argument for *certiorari* focuses on the Eleventh Circuit's "nearly identical" standard and labels the Eleventh Circuit as a virtual lone wolf, imposing a standard both impossible to meet and unknown to any other federal appellate circuit. This argument rests on the fundamentally flawed premise that the Eleventh Circuit requires proof of a similarly situated comparator to establish a *prima facie* case of discrimination. It does not.

Goodwin overlooks well established and controlling case law holding that a plaintiff establishes a *prima facie* case by showing *either* (1) a similarly

situated person receiving more favorable treatment, *or* (2) some "other evidence" giving rise to an inference of discrimination. Goodwin further overlooks the District Court's assumption that she met the Eleventh Circuit's "nearly identical" standard and satisfied her *prima facie* case. Notwithstanding this assumption, Goodwin failed to show that the City's legitimate, nondiscriminatory reasons for its actions were a mere pretext for discrimination as required by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973).

I. A COMPARATOR IS NOT REQUIRED TO PROVE A *PRIMA FACIE* CASE OF DISCRIMINATION.

Goodwin first contends that the Eleventh Circuit unreasonably requires *any prima facie* case of discrimination to include proof of a similarly situated comparator. [Petition,p.11]. There is no such requirement.

Eleventh Circuit case law provides that, "[w]here evidence of similarly situated employees is unavailable, the plaintiff is required to produce other circumstantial evidence of discrimination to establish her *prima facie* case of disparate treatment." *Roxbury-Smellie v. Fla. Dep't of Corr.*, 324 F. App'x 783, 786 (11th Cir. 2009) (emphasis added). Proof of a similarly situated comparator is thus just one of two methods of proof available to Title VII plaintiffs.

> This either/or approach recognizes that:
>
> [i]t is not always possible to find suitable comparators and we have noted that "if a plaintiff fails to show the existence of a similarly situated employee, summary judgment is appropriate where no other evidence of discrimination is present."

Lee v. Mid-State Land & Timber Co., 285 F. App'x 601, 606 (11th Cir. 2008) (quoting *Rioux v. City of Atlanta, Ga.*, 520 F.3d 1269, 1277 (11th Cir. 2008)).[6] *See also McCann v. Tillman*, 526 F.3d 1370, 1374, n.4 (11th Cir. 2008) (recognizing that even in the absence of a comparator, some conduct may be so unfairly discriminatory that no reasonable person would find it non-actionable).

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[6] More than one formulation of the elements of a *prima facie* case exist. The Court in *McDonnell Douglas* recognized this when it articulated four elements for a *prima facie* case but stated that "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the *prima facie* proof required . . . is not necessarily applicable in every respect to differing factual situations." Appellees correctly argue that one way of establishing a *prima facie* case of employment discrimination [ ] requires the plaintiff to show that . . . [his misconduct] was the same or similar misconduct to that which a similarly situated employee engaged in, but was not similarly disciplined for.

Rioux v. City of Atlanta, Ga., 520 F.3d 1269, 1275 (11th Cir. 2008) (Internal citations omitted).

In *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079 (11th Cir. 2004), for example, the Eleventh Circuit found that the plaintiff "failed to identify any male employee who was similarly situated and treated more favorably than she was treated." Nonetheless, the court stressed that "[the plaintiff's] failure to identify a comparator does not end the analysis of her termination claim [because] summary judgment is appropriate [only] *where no other evidence of discrimination is present*." *Id.* at 1092 (emphasis in original).[7]

In *Sumerlin v. AmSouth Bank*, 242 F. App'x 687 (11th Cir. 2007), the Eleventh Circuit expressly recognized that a plaintiff need not even try to offer a similarly situated comparator to make a Title VII disparate treatment claim. The *Sumerlin* court asked only if the plaintiff's evidence gave rise to "an inference of discrimination." *Id.* at 690.

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[7] *See also Burke-Fowler v. Orange County, Fla.*, 447 F.3d 1319, 1325 (11th Cir. 2006) ("[b]ecause [the plaintiff] failed to establish valid comparators *and presented no other circumstantial evidence suggesting racial discrimination*, [she] did not establish a *prima facie* case of race discrimination.") (emphasis added); *Wright v. Sanders Lead Co.*, 217 F. App'x 925, 929 (11th Cir. 2007) (Plaintiff "failed to establish valid comparators and presented no other circumstantial evidence suggesting racial discrimination."); and *Davis v. Mgmt. Tech.*, 193 F. App'x 872, 874 (11th Cir. 2006) (plaintiff "failed to assert the existence of a *prima facie* case in the district court, *either* by successfully demonstrating disparate treatment as compared to a similarly situated employee *or otherwise*.") (emphasis added).

The Eleventh Circuit has repeatedly confirmed that summary judgment is appropriate only when "*no other evidence of discrimination is present*" – doing so no less than three times this very year. *Thomas v. Dep't of Corr. for Ga.*, 377 F. App'x 873, 879 (11th Cir. 2010); *Coar v. Pemco Aeroplex, Inc.*, 372 F. App'x 1, 4 (11th Cir. 2010); *Muhammad v. Audio Visual Servs. Group*, 380 F. App'x 864, 871 (11th Cir. 2010).[8] Contrary to Goodwin's claim that in the Eleventh Circuit a plaintiff's claim fails as a matter of law without a similarly situated comparator [Petition,p.11], the law in the Eleventh Circuit is clear that a plaintiff may offer either a similarly situated comparator, or some other evidence creating an inference of discrimination to establish her *prima facie* case. Goodwin chose the option of proving her claim of discrimination through comparators which she offered as similarly situated. She was not required to do so.

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[8] Cases applying this either/or approach go back much further. *See, e.g., Gresham v. City of Florence, Ala.*, 319 F. App'x 857, 864 (11th Cir. 2009); *Thomas v. Miami Veterans Med. Ctr.*, 290 F. App'x 317, 319 (11th Cir. 2008); *Gupta v. Walt Disney World Co.*, 256 F. App'x 279, 282 (11th Cir. 2007); *Austin v. City of Montgomery*, 196 F. App'x 747, 750 (11th Cir. 2006); *Roy v. Broward Sheriff's Office*, 160 F. App'x 873, 875 (11th Cir. 2005); *Martin v. Rumsfeld*, 137 F. App'x 324, 326 (11th Cir. 2005); *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997).

II. THE "NEARLY IDENTICAL" STANDARD IS IN ACCORD WITH THIS COURT AND WITH OTHER CIRCUITS.

Goodwin next challenges the Eleventh Circuit's use of the term "nearly identical" when describing the degree of similitude required between the misconduct of the proffered comparator and the misconduct of the plaintiff.

When a plaintiff chooses to prosecute her case by showing a similarly situated employee, the Eleventh Circuit requires that any alleged comparator be "*similarly situated in all relevant respects.*" *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1091 (11th Cir. 2004); *Knight v. Baptist Hosp. of Miami, Inc.*, 330 F.3d 1313, 1316-19 (11th Cir. 2003); *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997). When the issue is misconduct, the Eleventh Circuit advises:

> In determining whether employees are similarly situated for purposes of establishing a *prima facie* case, it is necessary to consider whether the employees are involved in or accused of *the same or similar conduct* and are disciplined in different ways. . . . We require that the *quantity and quality* of the comparators' misconduct be *nearly identical* to prevent courts from second-guessing employers'

> reasonable decisions and confusing apples and oranges.

Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999) (internal citations omitted) (emphasis added.)[9]

Goodwin contends that "nearly identical" means "identical" in the Eleventh Circuit,[10] a requirement which is too "exacting," is "virtually impossible to meet," and is in conflict with every other circuit[11] and with this Court. [Petition,pp.9,10,18,19]. Goodwin's reliance on the fact that not all circuits use the same words to describe the required legal analysis allows her to raise the appearance of a significant circuit split where, in law and fact, none exists. [Petition,pp.23-24].

All circuits agree that when a plaintiff chooses to prove her case through the use of a comparator,[12] the

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[9] This requirement is not new. *See, e.g., Nix v. WLCY Radio/Rahall Communications,* 738 F.2d 1181 (11th Cir. 1984) (Relying on *Davin v. Delta Airlines, Inc.,* 678 F.2d 567 (11th Cir. 1982) and other earlier 5th Circuit cases) ("[A] plaintiff fired for misconduct makes out a *prima facie* case of discriminatory discharge if he shows . . . 'that the misconduct for which [he] was discharged was nearly identical to that engaged in by [an employee outside the protected class] whom [the employer] retained.' ").

[10] "Any distinction between 'nearly identical' and 'identical' in Eleventh Circuit cases exists only in theory." [Petition,p.39].

[11] In some places Goodwin indicates the standard conflicts only with six other circuits. [Petition,p.10]

[12] *First Circuit*: *Molloy v. Blanchard*, 115 F.3d 86, 91 (1st Cir. 1997) (*prima facie* case requires proof of a comparator

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"similarly situated in all relevant aspects."). *Second Circuit*: *Davey v. Jones*, 371 F. App'x 146, 148 (2d Cir. 2010) (*prima facie* case requires circumstances giving rise to an "inference of discrimination"); *Beauchat v. Mineta*, 257 F. App'x 463, 465 (2d Cir. 2007) (*prima facie* case requires proof of "similarly situated" comparator). *Third Circuit*: *Vernon v. A & L Motors*, 2010 WL 2089640, at *2 (3d Cir. 2010) (*prima facie* case requires circumstances giving rise to an "inference of unlawful discrimination"); *Williams v. N.J. Trenton Psychiatric Hosp.*, 2009 WL 405640 (3d Cir. 2009) (*prima facie* case requires proof of "similarly situated" comparator). *Fourth Circuit*: *Mackey v. Shalala*, 360 F.3d 463, 468 (4th Cir. 2004) (*prima facie* case requires circumstances giving rise to an "inference of unlawful discrimination."); *Cottman v. Rubin*, 35 F. App'x 53, 55 (4th Cir. 2002) (*prima facie* case requires proof of "similarly situated" comparator). *Fifth Circuit*: *Lee v. Kan. City S. Ry. Co.*, 574 F.3d 253, 259 (5th Cir. 2009) (*prima facie* case requires proof of "similarly situated" comparator). *Sixth Circuit*: *Clayton v. Meijer, Inc.*, 281 F.3d 605, 610 (6th Cir. 2002) (*prima facie* case requires proof of "similarly situated" comparator). *Seventh Circuit*: *Atanus v. Perry*, 520 F.3d 662, 672 (7th Cir. 2008) (*prima facie* case requires proof of "similarly situated" comparator); *Robin v. Espo Engineering Corp.*, 200 F.3d 1081, 1090 (7th Cir. 2000) (*prima facie* case requires circumstances giving rise to an "inference of discrimination"). *Eighth Circuit*: *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2008) (*prima facie* case requires proof of "similarly situated" comparator); *Arnold v. Nursing and Rehabilitation Center at Good Sheppard, LLC*, 471 F.3d 843, 846 (8th Cir. 2006) (*prima facie* case requires circumstances giving rise to an "inference of discrimination"). *Ninth Circuit*: *Bodett v. CoxCom, Inc.*, 366 F.3d 736, 743 (9th Cir. 2004) (*prima facie* case requires either "similarly situated" comparator or circumstances giving rise to an "inference of discrimination."). *Tenth Circuit*: *Robinson v. Dean Foods Co.*, 654 F.3d 1268, 1276 (10th Cir. 2009) (*prima facie* case requires circumstances giving rise to an inference of discrimination). *Eleventh Circuit*: *Roxbury-Smellie v. Fla. Dep't of Corr.*, 324 F. App'x 783, 786 (11th Cir. 2009) (*prima facie* case requires proof of a "similarly situated" comparator or "other evidence" giving rise to an inference of

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comparator must be "similarly situated."[13] All circuits further agree that the quantity and quality of the misconduct must at the very least be comparable. "Ten circuits," Goodwin argues, "have rejected this avowedly stringent [nearly identical] standard," six circuits utilizing a "demonstrably different" and "manifestly less restrictive" standard and four other circuits utilizing only a "comparable seriousness" standard. [Petition,p.23]. Regardless of the word labels used, all courts are engaging in the same analysis: considering the totality of the circumstances

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discrimination). *D.C. Circuit*: *Czekalski v. LaHood*, 589 F.3d 449 (D.C. Cir. 2009) (*prima facie* case requires evidence giving rise to an inference of discrimination).

[13] The origin of the phrase "similarly situated" in the Eleventh Circuit dates back to *Baldwin v. Birmingham Bd. of Ed.*, 648 F.2d 950 (5th Cir. 1981), which relied on decisions of this Court:

> We held in *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251 (5th Cir. 1977), a Title VII disparate treatment case, that the discharge of the black plaintiff and the retention of another white employee under apparently similar circumstances stated a *prima facie* case. *See McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280-85, 96 S.Ct. 2574, 2578-81, 49 L.Ed.2d 493 (1976). Such a showing, which is essentially the four-part *prima facie* case set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), as applied to wrongful discharge cases, raises the inference, in the absence of explanation, that the defendant's actions were based on discriminatory motivation. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978); *Ramirez v. Sloss*, 615 F.2d at 168-69.

to determine whether the conduct is sufficiently similar to create an inference of discrimination.

By way of example, in the "manifestly less restrictive" category, Goodwin cites *Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845 (8th Cir. 2005), as following a "low threshold" standard for determining whether employees are similarly situated at the *prima facie* case stage and a "rigorous" test at the pretext stage. [Petition,pp.28-29]. *Rodgers,* 417 F.3d at 852, 853. The standards imposed by the Eighth Circuit, however, are in line with the Eleventh Circuit. At the *prima facie* case stage, a plaintiff must prove that she and a comparator were "involved in or accused of the same or similar conduct and were disciplined in different ways." *Rodgers,* 417 F.3d at 852 (emphasis added).

Compare the underlined verbage above with the Eleventh Circuit's almost verbatim language in Goodwin: "When a plaintiff alleges discriminatory discipline, to determine whether employees are similarly situated, we evaluate 'whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways.'" (quoting *Burke-Fowler v. Orange Cnty., Fla.*, 447 F.3d 1319, 1323 (11th Cir. 2006)). [App.11a]. The Eighth and Eleventh Circuits are performing the same legal analysis, and use the same language in doing so.

At the pretext stage, the Eighth Circuit requires a plaintiff to prove that "employees outside of her protected group were similarly situated in all relevant respects" and that their misconduct was of

"comparable seriousness." *Rodgers,* 417 F.3d at 853. Once again, compare this pronouncement with the Eleventh Circuit's observation in Goodwin's case: "[T]he 'comparator must be similarly situated in all relevant respects' and 'nearly identical' to the plaintiff." [App.10a].

In *Rodgers*, the Eighth Circuit found that although the plaintiff and her alleged comparator violated the same policy, "the frequency and seriousness of [the plaintiff's] violations . . . set her apart." *Rodgers,* 417 F.3d at 853-854. This is the exact same analysis undertaken by the Eleventh Circuit in looking at the "quantity and quality" of the misconduct. [App.10a (noting *Burke-Fowler* standard)]. The only distinction between the two standards is in the phraseology: "comparable seriousness" and "nearly identical." It is a distinction without a difference. The application of the standard is the same. The outcome for Goodwin would have been the same in the Eighth Circuit.

Amongst Goodwin's group of "comparable seriousness" courts is the Seventh Circuit. Contrary to Goodwin's argument, it too is in harmony with the Eleventh Circuit.

Peirick v. Indiana University-Purdue University Indianapolis Athletics Department, 510 F.3d 681 (7th Cir. 2007) [Petition,p.24,n.12, and p.26,n.15], involved an allegedly discriminatory termination of the women's tennis coach. In conducting its *de novo* review of the district court's granting of summary judgment,

the Seventh Circuit undertook an extensive analysis to determine whether the plaintiff's three proffered comparators (other male coaches) were similarly situated. "To assess whether two employees are similarly situated, 'a court must look at all relevant factors, the number of which depends on the context of the case.'" *Peirick*, 510 F.3d at 688. The *Peirick* court specified that the plaintiff must typically show she was "similarly situated with respect to performance, qualifications, and conduct" but, like the Eleventh Circuit, noted that its requirement should not be inflexible. *Id.*

In its examination of the three comparators, the Seventh Circuit found one not to be an adequate comparator, noting that although he had NCAA rule violations and his evaluation noted areas for improvement, these concerns were minor in comparison to the plaintiff's. The court found two other coaches to be valid comparators. These coaches had no difference in job duties from the plaintiff. And, like the plaintiff, both of these coaches engaged in serious violations of the University's principles of conduct and both had received complaints of and were disciplined for verbal abuse. *Peirick*, 510 F.3d at 690-691.

Although it is impossible to know how the Eleventh Circuit (or any other circuit) would rule in this case if presented, the analysis for the Eleventh Circuit would be the same: "[T]he 'comparator must be similarly situated in all relevant respects' and 'nearly identical' to the plaintiff."

Whether this analysis is termed "comparable seriousness" or "nearly identical," both courts are engaging in the same activity. The Eleventh Circuit carefully considers on a case by case basis whether the comparators are similar in all relevant respects.

In *Wright v. Sanders Lead Co.*, 217 F. App'x 925, 929 (11th Cir. 2007), the Eleventh Circuit provided an analysis of the "nearly identical" standard in its typical context:

> [T]he district court properly surmised, [that] Wright failed to establish that he and Whitman were "similarly situated in all relevant respects." *Jones*, 137 F.3d at 1311. First, the two employees did not engage in similar acts of misconduct. The evidence suggests that Whitman was fired for smoking on company premises, whereas Wright was fired because he asked a guard not to report his employee for a rule violation. Whitman, a laborer, committed a breach of safety, but Wright, a supervisor, committed a breach of trust. The acts of misconduct for which the two men were disciplined were substantially different. We have stated that the comparator's misconduct must "be nearly identical [to the plaintiff's] to prevent courts from second-guessing employer's reasonable decisions and confusing apples with oranges." *Burke-Fowler*, 447 F.3d at 1323 (citation omitted); *Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001) (same). Similarly, here, comparing Wright's transgression (covering up wrongdoing) with Whitman's

> (smoking) is akin to comparing apples with oranges.

Wright, 217 F. App'x at 929.

Goodwin provides a list of 48 Eleventh Circuit employment discrimination cases applying the "nearly identical" standard for which she boldly states: "no plaintiff has ever been able to meet that standard." [Petition,pp.9-10,n.2, and App.41a]. However, the cases cited by Goodwin do not demonstrate that this standard has not been and can never be met. A competent analysis of just a few of the cases cited shows that Goodwin's examination is superficial at best and fails to consider the case as a whole.

For example, the second case on Goodwin's list [App.41a] is *Thomas v. Department of Corrections for Ga.*, 377 F. App'x 873, 880 (11th Cir. 2010). Goodwin is correct that the Eleventh Circuit found no error in the district court's determination that the plaintiff did not show a comparator sufficiently similarly situated so as to create an inference of discrimination. Nonetheless, before reaching this conclusion, the Eleventh Circuit analyzed the conduct finding that although similar (falsification of timesheets), there were material differences between the two. *Thomas*, 377 F. App'x at 880. The court then gave the plaintiff the benefit of any doubt and assumed that he *did* show a similarly situated comparator. The plaintiff's case ultimately failed, not because of an inability to show a proper comparator but because the comparator was not treated better, the plaintiff was.

Accordingly, there could be no inference of discrimination. *Thomas*, 377 F. App'x at 880.

Similarly, in *Jiles v. United Parcel Service, Inc.*, 360 F. App'x 61 (11th Cir. 2010), Goodwin is correct that the Eleventh Circuit affirmed the district court's determination that the plaintiff did not show a similarly situated comparator. However, the court's analysis clearly revealed the deficiency in the plaintiff's presentation of evidence. Although the plaintiff alleged he and another employee had similar employment agreements, he failed to show that both were "similarly situated in all relevant respects." *Jiles*, 360 F. App'x at 65. Most critically, he did not show that the comparator had even been accused of dishonesty much less that he was disciplined any differently than the plaintiff so as to create an inference of discrimination. *Id.*

Yet another example of Goodwin's specious argument and superficial analysis is seen in *Foster v. Board of Regents of University System of Ga.*, 342 F. App'x 465 (11th Cir. 2009), wherein the district court "assumed *arguendo* that [the plaintiff] made out a *prima facie* case on this claim, and [the defendant did] not take issue with that assumption on appeal." Although the court ruled against the plaintiff on other grounds, it assumed that he fully satisfied his *prima facie* case, i.e. that he met the nearly identical standard. *Foster*, 342 F. App'x at 468.

These few examples expose the absence of the meaningful and detailed analysis needed before leaping to Goodwin's conclusion that no plaintiff has ever met the "nearly identical" standard. Presumably, Goodwin is looking only at a subclass of cases – those where the plaintiff appealed the entry of summary judgment against him on the nearly identical standard. Yet she offers no information as to the total number of cases filed or the specifics of each appeal. "Statistics without any analytical foundation are 'virtually meaningless.'" *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1089 (11th Cir. 2004) (citing *Evans v. McClain of Ga., Inc.*, 131 F.3d 957, 963 (11th Cir. 1997) (quoting *Brown v. Am. Honda Motor Co.*, 939 F.2d 946, 952-53 (11th Cir. 1991), *cert. denied*, 502 U.S. 1058, 112 S.Ct. 935 (1992)).

Notably missing from Goodwin's argument is a case specifically requiring the "exact same" misconduct. Cases requiring such a strict comparison do not exist in the Eleventh Circuit.

Goodwin characterizes *McCalister v. Hillsborough County Sheriff*, 211 F. App'x 883, 886 (11th Cir. 2006), as holding "that a plaintiff fired for violating six policies must produce a comparator who violated the exact same six policies without being fired." [Petition,p.21]. This was not the case.[14]

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[14] The City identifies only two other cases which, at first glance, could be mistakenly interpreted as requiring the exact

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It is true that the *McCalister* court determined that the plaintiff failed to identify "a comparator who engaged in a quantity and quality of misconduct similar to his." *Id.* at 885. It is also true that in reaching this conclusion, the court considered that none of the proffered comparators broke all six of the same rules. *Id.* at 886. But the Eleventh Circuit did not stop its analysis with the number of violations. The court also reviewed the conduct of a proffered employee alleged to have also committed McCalister's

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same number of violations. However, a closer reading shows that they do not.

In *Moore v. Alabama Department of Corrections*, 137 F. App'x 235 (11th Cir. 2005), the court noted that while the plaintiff was "found guilty of five separate regulatory violations, [the comparator] was disciplined for only a single violation." The court, however, did not base its conclusion on this fact alone. Instead, the court considered "all the facts together," including that the employees: (1) had different ranks, (2) had different supervisors, and (3) engaged in different misconduct. *Id.* at 239. Only in light of the totality of the circumstances did the court find that the alleged comparator was insufficient.

In *Toney v. Montgomery Jobs Corps*, 211 F. App'x 816 (11th Cir. 2006), the court found that the plaintiff and his alleged comparators were not similarly situated where they engaged in some, but not all, of the misconduct the plaintiff had committed. Discussing the exact nature of the offenses engaged in by all the parties, the court determined that the "quantity and quality" of the misconduct was comparable. It was not that the alleged comparators did not engage in the exact same misconduct, but rather that the plaintiff had engaged in more than twice as many instances of misconduct as his alleged comparators. Under these circumstances, the court found that other employees were not sufficient comparators.

most serious violation – leaving an off-duty assignment. In doing so, the court found that the other employee's conduct (failing to report for duty because of a motor vehicle accident) was not of the same *quality* as the plaintiff's (departing one's post mid-shift for a tryst, leaving military personnel and property unguarded, lying to another officer, and submitting a false document).[15] *Id.* at 886. The Court's consideration of anything less than all six of the same rules clearly evinces that it did *not* require exactitude.

Goodwin contends that in her case, the Eleventh Circuit followed *McCalister* and moved beyond "nearly identical" to "identical" by requiring Goodwin to produce a male comparator who violated the exact same seven rules. [Petition,p.21]. While it is true that the Eleventh Circuit looked at quantity, like *McCalister*, it did not end its analysis there.

> Although the comparators identified by Goodwin arguably violated some of the Department's Rules and Regulations, . . . there has been no showing that any of them violated all of the Rules and Regulations that resulted in her termination [i.e., quantity] **or**

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[15] The court also reviewed the conduct of another employee who was charged with three of the same six offenses. Although it did observe the lesser quantity of misconduct (three offenses, not six), more importantly, the Court also determined that the quality of offenses were not equivalent (falsification of documents v. mid-shift frolic and endangerment of unguarded personnel and property). *Id.* at 886.

> that their alleged misconduct was nearly identical to hers [i.e., quality].

[App.14a,15a (emphasis added)]. In considering Goodwin's claim, the Eleventh Circuit did not require exact identity between the misconduct of Goodwin and her proffered comparators.

Eleventh Circuit opinions demonstrate that the "nearly identical" standard is not the *per se* rule that Goodwin suggests. [Petition,p.19]. Rather, it is a deliberate consideration of the totality of circumstances in each case in recognition of this Court's caution against rigidity.[16] "The methods of presenting a *prima facie* case are flexible and depend on the particular situation." *Alvarez v. Royal Atlantic Developers, Inc.*, 610 F.3d 1253, 1264 (11th Cir. 2010) (citing *Wilson*, 376 F.3d at 1087).

> More than one formulation of the elements of a *prima facie* case exist. The court in *McDonnell Douglas* recognized this when it articulated four elements for a *prima facie* case but stated that "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the *prima facie* proof required . . . is not necessarily applicable in every respect to differing factual situations." Appellees correctly argue that one way of establishing a

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[16] "The *prima facie* case method . . . was 'never intended to be rigid, mechanized, or ritualistic.'" *U.S. Postal Service v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. at 1478, 1482 (1983).

> *prima facie* case of employment discrimination [ ] requires the plaintiff to show that . . . [his misconduct] was the same or similar misconduct to that which a similarly situated employee engaged in, but was not similarly disciplined for."

Rioux v. City of Atlanta, Ga., 520 F.3d 1269, 1275 (11th Cir. 2008) (Holding the plaintiff did not show a comparator but did meet her *prima facie* case by showing other evidence of discrimination.) (Internal citations omitted) (emphasis added).

The Eleventh Circuit's "nearly identical" standard is in accord with other circuits and with the directives of this Court and is an appropriate mechanism to ensure comparison of apples with other apples, not with oranges.

III. CHANGING THE "NEARLY IDENTICAL" STANDARD WILL NOT AFFECT GOODWIN'S *PRIMA FACIE* CASE.

Even if identification of a comparator were required, and even if the "nearly identical" standard were completely ignored, or mal-applied as Goodwin contends, Goodwin's claim still fails.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), this court "established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases." *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 310 (1996) (quoting *St. Mary's*

Honor Center v. Hicks, 509 U.S. 502, 506, 113 S.Ct. 2742, 2746 (1993)). The *McDonnell Douglas* proof construct requires that a plaintiff first create a presumption of discrimination[17] by establishing the minimum requirements of a *prima facie* case. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824. Once the plaintiff has met this initial burden, the burden of production shifts to the employer to articulate "some legitimate, nondiscriminatory reason" for its actions. *Id.* When the employer satisfies its burden of production, the burden of proof shifts a second time to the plaintiff to prove that each of the proffered legitimate, nondiscriminatory reasons are pretextual. *McDonnell Douglas*, 411 U.S. at 804, 93 S.Ct. at 1825.[18]

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[17] Under the *McDonnell Douglas* scheme, establishment of the *prima facie* case "creates a presumption that the employer unlawfully discriminated against the employee." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993) (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255, n.8, 101 S.Ct. 1089, 1094, n.8, 67 L.Ed.2d 207 (1981)).

[18] The *McDonnell Douglas* framework "is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943 (1978). The burden-shifting framework triggered by a defendant's *prima facie* case is essentially just "a means of 'arranging the presentation of evidence'" *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509-510, and n.3, 113 S.Ct. 2742 (1993).

This Court has made clear that once an employer satisfies its burden to articulate a legitimate, nondiscriminatory reason for its actions, the presumption raised by the *prima facie* case is rebutted and the plaintiff has "the full and fair opportunity to

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This case does not present any controversy regarding the Eleventh Circuit's *prima facie* case requirements or its "nearly identical" standard because the District Court accepted that Goodwin satisfied the nearly identical standard and established her *prima facie* case, but ultimately determined that Goodwin failed to carry her burden of proving that the City's legitimate nondiscriminatory reasons were merely pretext for discrimination.[19] [App.30a (promotion), 34a (discipline)]. Thus, even if this Court granted *certiorari* and issued a writ to the Eleventh Circuit rejecting its "nearly identical" standard, the result for Goodwin would be the same.[20]

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demonstrate, through presentation of his own case and through cross-examination of the defendant's witnesses, that the proffered reason was not the true reason for the employment decision, and that [the protected class] was." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-508 (1993) (internal quotations and citations omitted). The plaintiff always retains the "ultimate burden" of proving intentional discrimination. *Hicks*, 509 U.S. at 508 (quoting *Burdine*, 450 U.S. at 256).

[19] Furthermore, to the extent Goodwin disagrees with the District Court's determination that her evidence did not establish pretext, this is insufficient grounds for *certiorari*. *See* Supreme Court Rule 10; *Gonzales v. Crosby*, 125 S.Ct. 2641, 2655, n.7 (2005) (Stevens, J., dissenting) ("error-correction is a disfavored basis for granting review"); *Overton v. Ohio*, 534 U.S. 982, 985 (2001) (Breyer, J., dissenting) ("[W]e cannot act as a court of simple error correction.").

[20] Goodwin also argues that contrary to the Eleventh Circuit, the First, Second, Third, Ninth, Tenth, and District of Columbia Circuits do not require a plaintiff to establish a similarly situated comparator as part of the *prima facie* case but only at the pretext stage. While this is not an accurate

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statement (see below), the shifting of the comparator analysis (from the *prima facie* case stage to the pretext stage) is not material to the outcome of this case.

The following recent cases in each of these circuits have required plaintiffs to establish a similarly situated person as part of their *prima facie* case:

First Circuit: *Prescott v. Higgins*, 538 F.3d 32, 41 (1st Cir. 2008) (The Hon. Sandra Day O'Connor, sitting by designation) ("To make out a *prima facie* case of racial discrimination in compensation under Title VII or § 1981, Prescott must show that . . . similarly-situated employees outside the protected class received more favorable treatment). *Second Circuit*: *Billue v. Praxair, Inc.*, 2008 WL 4950991, *1 (2d Cir. 2008) (Holding at the *prima facie* stage that "[the] plaintiff has not adequately established disparate treatment because his proposed "similarly situated" employee was materially distinct from plaintiff."); *Beauchat v. Mineta*, 257 F. App'x 463, 465 (2d Cir. 2007) (plaintiff failed his *prima facie* case where he "did not adduce evidence that other individuals identified for purposes of comparison were 'similarly situated in all material respects.'"); *Davis v. AT&T Wireless*, 157 F. App'x 360, 361-62 (2d Cir. 2005) (same); *Pilman v. N.Y. City Hous. Auth.*, 64 F. App'x 293, 296 (2d Cir. 2003) (same). *Third Circuit*: *Williams v. N.J. Trenton Psychiatric Hosp.*, 2009 WL 405640, *1 (3d Cir. 2009) ("To make out a *prima facie* case of employment discrimination under Title VII, a plaintiff must show that . . . other similarly situated persons not in the protected group received better treatment."); *Grassmyer v. Shred-It USA, Inc.*, 2010 WL 3330102, *8 (3d Cir. 2010) (recognizing that "[a]s an alternative to the original fourth prong of the *prima facie* case [articulated in *McDonnell Douglas*], a plaintiff may show that similarly situated individuals outside the plaintiff's class were treated more favorably.) (citing cases); *Brown v. Hamot Med. Ctr.*, 323 F. App'x 140, 143 (3d Cir. 2009) ("Suffice it to say that we agree with the District Court that Brown has not shown that any similarly situated male resident was treated more favorably than she. The Court correctly concluded that Brown failed to establish a *prima facie* case."). *Ninth Circuit*: *Anthoine v. N. Cent. Counties Consortium*, 605 F.3d 740, 753 (9th Cir. 2010)

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A. Goodwin's Promotion

The District Court's analysis already factored in establishment of the *prima facie* case.[21] Goodwin's claim failed because she could not overcome the City's "straightforward" explanation for why she was not given the promotion – the male sergeant "was given the duty assignment because he outranked Plaintiff."

("To establish a *prima facie* case under *McDonnell Douglas*, a plaintiff must demonstrate that . . . similarly situated employees not in his protected class received more favorable treatment."); *Mitchell v. Superior Court of Cal. San Mateo*, 312 F. App'x 893, 894 (9th Cir. 2009) ("the record does not contain any evidence indicating that the Superior Court treated other similarly situated employees outside of the protected class differently. Mitchell has failed to establish a *prima facie* case."). *Tenth Circuit*: *Fulcher v. City of Wichita*, 2010 WL 2825690, *3 (10th Cir. 2010) ("the plaintiff has the burden to establish a *prima facie* case of discrimination, which requires him to show . . . disparate treatment among similarly situated employees."); *Sydney v. ConMed Elec. Surgery*, 275 F. App'x 748, 751 (10th Cir. 2008) (same).

[21] As the District Court found:

> Without performing a detailed analysis of the prestige associated with the Watch Relief Supervisor duty, I will assume that being passed over for this position is an adverse employment action. It is undisputed that both times Plaintiff was passed over for the Watch Supervisor position that the position was given to a male officer. Thus, Plaintiff has made her *prima facie* case of discrimination under *McDonnell Douglas*.

[App.29a-30a (emphasis added)].

[App.30a]. The District Court found that rather than attacking the City's position "head on," Goodwin only argued that she "deserved the promotion." [App.30a]. As the Court stated:

> None of Plaintiff's complaints about why she did not receive the [promotion] call into question Defendant's nondiscriminatory reason for its action. Importantly, Plaintiff has provided no reason whatsoever for her complaint that [the male sergeant] received the position over her. Plaintiff's inability to cast sufficient doubt on Defendant's proffered nondiscriminatory reason means that Plaintiff's argument fails.

[App.31a].

Despite "the full and fair opportunity to demonstrate, through presentation of [her] own case and through cross-examination of the [City's] witnesses, that [its] proffered reason was not the true reason for the employment decision, and that [gender] was," *Hicks*, 509 U.S. at 507-508, Goodwin's claim failed. This determination was made by the District Court after it made the assumption that Goodwin had indeed satisfied her *prima facie* case. [App.29a-30a]. The nearly identical standard did not act as a barrier to her claim.

On *de novo* review, the Eleventh Circuit first found that Goodwin failed to identify a male comparator similar to her in any relevant respect:

> [T]he record also shows that the male officer was promoted because he (a sergeant) outranked Goodwin (a corporal) in the Department. Based on the difference in her rank, Goodwin has failed to show that she and the male officer who was promoted to the Relief Supervisor position were similarly situated.

[App.10a]. Nevertheless, the Eleventh Circuit also assumed that Goodwin had met the "nearly identical" standard and satisfied her *prima facie* case. [App.10a-11a]. Even under this assumption, the City remained entitled to summary judgment.

> [A]s the City articulated a legitimate, non-discriminatory reason for the alleged adverse action, i.e. the male officer was of a higher rank than Goodwin, it has satisfied the second phase of the burden-shifting framework of *McDonnell Douglas*. Goodwin did not present any evidence that the City's legitimate, non-discriminatory reason for promoting the higher-ranking male officer, instead of her, was pretextual.

[App.10a-11a (emphasis added)].

Both the District Court and the Eleventh Circuit denied Goodwin's discriminatory promotion claim without restraint by the "nearly identical" requirement.

B. Goodwin's Termination

The District Court's analysis was the same for Goodwin's discriminatory discipline/termination claim. After assuming that Goodwin met the Eleventh Circuit's "nearly identical" standard and satisfied her *prima facie* case [App.34a], the District Court found that the City's proffered nondiscriminatory reasons were "sound" and that Goodwin failed to establish pretext:

> Even if Plaintiff had established a *prima facie* case, Defendant's legitimate, nondiscriminatory reasons are sound. The I.A. investigation was conducted in a routine manner in accordance with Department policies and procedures following the complaint lodged against Plaintiff. The I.A. investigation recommended termination based on seven violations of Department policy – five of which [Goodwin] later admitted in her resignation.

[App.34a]. In determining that Goodwin failed to establish pretext, the District Court found it significant that Goodwin "fully admitted to violating five Department policies." [App.21a,35a].

On appeal, the Eleventh Circuit affirmed the District Court's finding that Goodwin had not satisfied her *prima facie* case noting that there was no showing that any proffered comparator violated all of the same Rules and Regulations or that their alleged misconduct was nearly identical to hers. [App.11a,14a,15a]. In this section of its analysis, the

Court elected not to re-examine its determination just pages earlier in the promotion analysis that the City had articulated a legitimate, nondiscriminatory reason for its actions and that Goodwin did not present any evidence of pretext. [App.10a,11a,13a-15a].

IV. THE "NEARLY IDENTICAL" STANDARD IS NOT AT ISSUE AND SUMMARY JUDGMENT WAS APPROPRIATE.

"It matters not whether [Goodwin] has made out a *prima facie* case if she cannot create a genuine issue of material fact as to whether [the City's] proffered reasons for firing her are pretext masking discrimination." *Rioux,* 520 F.3d at 1265.

Goodwin convinces herself that the District Court and the Eleventh Circuit erroneously required her to demonstrate a comparator who violated the exact same seven violations as she. [Petition,p.6]. Although Goodwin complains that it was impossible for her to find such a comparator, she was not required to do so. Having chosen that method of proof, however, Goodwin failed to even establish that any male was ever found guilty of committing her most serious offense – lying during an internal investigation – and was treated more favorably.

Notwithstanding the other six violations, lying during her I.A. investigation was unquestionably the most serious (and termination worthy) offense. Forget that Goodwin failed to show a comparator engaging in all seven violations – she also failed to show a

comparator engaging in this single most important offense. As the District Court recognized:

> When it comes to disciplining employees for honesty violations, Defendant is entitled to treat Plaintiff's violation of its honesty policy as more severe than a violation of its other policies. *Jones v. Bessemer Carraway Med. Ctr.*, 137 F.3d at 1311-12 ("Title VII does not take away an employer's right to interpret its rules as it chooses, and to make determinations as it sees fit under those rules.").

[App.33a-34a].

When the investigation revealed that a male officer and another female officer also lied in the investigation, they too were immediately terminated. [App.21a; R.30-7,¶32]. A second male avoided termination only by admitting to his untruthfulness and recanting. His ultimate honesty saved his job but still landed him a five day suspension. [R.30-7,¶32].

In support of its reasons for termination, the City proffered five other male officers who were found to have lied. [R.30-7,¶40]. All were terminated. There is no possible inference of discrimination to be drawn.

Goodwin's argument that the District Court and Eleventh Circuit should have considered her unsubstantiated allegations of other employee misconduct is equally without merit. Of particular importance to the District Court on Goodwin's proposed comparators was the fact that she offered "no evidence" that

any supervisors were even aware of the alleged misconduct:

> With regard to her *prima facie* case:
>
> Plaintiff offers no evidence that any of the officers she complains of were ever reported up the chain of command as she was. It is undisputed that the Department cannot take formal personnel action if no complaint was filed or if supervisors were otherwise unaware of disciplinary problems within their ranks. A plaintiff's allegations of unverified misconduct by other employees in an attempt to make those employees into comparators are insufficient to sway a court.

[App.32a-33a].

> With regard to pretext:
>
> In her attempt to establish pretext, Plaintiff provides a laundry list of male employees who were not punished for various activities. . . . Plaintiff fails to show that Department policies were ever inconsistently applied, however. Plaintiff provides no evidence that any of the alleged violations were ever reported and [therefore] cannot establish that the male employees were similarly situated to her.

[App.34a-35a].

No matter how "similar" the misconduct, no employee can be "similarly situated" – under any standard – absent some evidence that the decisionmaker

was even aware of the misconduct. Goodwin's failure to establish that the City treated males who lied during an internal investigation differently is alone sufficient to find that she failed to identify a similarly situated comparator.

On a final note, Goodwin strongly suggests that whether a comparator is similarly situated is a question for the jury and not for the Court. [Petition,pp.19,36]. This argument is not new. Relying on multiple decisions of this Court, the Eleventh Circuit long ago confirmed the propriety of summary judgment in employment discrimination cases.

> While acknowledging that questions of fact in job discrimination cases are "both sensitive and difficult" and "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," the Supreme Court has told us that "none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 524, 113 S.Ct. 2742, 2756, 125 L.Ed.2d 407 (1993) (quoting *Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983)). And quite recently, the Court rejected a rule which would have made it easier for job discrimination plaintiffs to get their case to a jury, explaining that "[t]o hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and we have reiterated that trial courts

> should not treat discrimination differently from other ultimate questions of fact." *Reeves*, 120 S.Ct. at 2109 (internal quotation and citation omitted). The long and short of it is that the summary judgment rule applies in job discrimination cases just as in other cases. No thumb is to be placed on either side of the scale.

Chapman v. AI Transport, 229 F.3d 1012, 1026 (11th Cir. 2000).

CONCLUSION

"Nearly identical" means – "*similarly situated in all relevant respects*." This is, at the core, the same analytical framework applied in every other circuit regardless of the word labels chosen by those circuits.

If there is a case where application of the "nearly identical" standard is determinative, this is not it. Goodwin's case fails even if the Court had applied a "comparatively similar" standard (or any other standard deemed by Goodwin to be "less demanding"), even if it was applied in the pretext stage (as opposed to an element of Goodwin's *prima facie* case), and even if the standard was abandoned altogether.

The Eleventh Circuit's "nearly identical" standard has existed since 1982 and is in accord with the directives of this Court. Goodwin's Petition offers no reason to fix something that is not broken. The Petition for Writ of *Certiorari* is nothing more than an

appeal to this Court to second-guess the City's business judgment and it should be denied.

Respectfully submitted,

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